Supreme Court, U.S.
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No. 92-1421

In The Supreme Court of the United States

OCTOBER TERM, 1992

Michael J. Haley,

Petitioner,

vs.

Department of the Treasury, and
Merit Systems Protection Board,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY TO RESPONDENTS BRIEF IN OPPOSITION

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ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO SET AN APPROPRIATE STANDARD FOR JUDGING THE REASONABILITY OF WHISTLEBLOWERS BELIEFS.

Respondent characterizes the question presented in this case as to whether substantial evidence supported the conclusion of the Merit Systems Protection Board that Petitioners disclosure was not protected by the Whistleblower Protection Act because Petitioner lacked a reasonable belief that the disclosed information revealed Agency misconduct. Respondent characterizes Petitioners contention that he reasonably believed that the information evidenced the Agency wrong doing, as a "fact-bound contention". Brief in Opposition, 9.

Respondent raises the spector of a detailed evidentiary review.

The question of a purported whistleblowers belief

is and must always be an evidentiary question. Petitioner contends that because there is presently no Supreme Court ruling on this matter, and because a finding that the Petitioner did not have a reasonable belief that the Agency was doing wrong potentially invalidates every imaginable whistleblower claim; the Court must provide some guidance. This is precisely the reason why certiorari should be granted.

Since it is unlikely that an alleged whistleblower would risk his or her job and reputation, without having a reasonable belief that the law or regulations had been violated, Petitioner contends that the Court should set strict limits for review of the question of reasonable belief. Petitioner argues that in cases where there is no suggestion of a possible motive other than preventing unlawful action, the lack of a reasonable belief should be found only in the event that:

1. There is positive evidence of bad faith on

the part of the whistleblower;

2. There is positive evidence of the whistleblower's actual non-belief; or

3. The Agency can demonstrate that no reasonable person could have believed that there was a violation of law, rule, regulation, gross mismanagement, gross wasted funds or an abusive authority or a substantial specific danger to public health or safety.

Under such a standard the case before the Court would be a very easy case.

There is no evidence other than the Petitioners own testimony as to his good faith and actual belief. A mere perusal of the evidence would reveal that the circumstances indicate numerous reasonable grounds for belief that different laws, rules and regulations had been violated, and that the Agency abused its authority.

The basic contentions as to the Petitioners reasonable belief as to Agency malfeasance are set forth

in the original petition. Petitioner here only responds to arguments raised in the Brief in Opposition.

II. THE THREAT TO APPOINT A CONSERVATOR UNLESS MCM SIGNED THE CONSENT TO MERGE AGREEMENT WAS ITSELF A VIOLATION OF THE STATUTES.

Respondent argues that because no receiver was ever appointed the threat to appoint one was not a violation of law. Brief in Opposition, 10. A whistleblower need not wait until the violation is completed, but can blow the whistle in order to prevent the violation of law, rule or regulation. Respondent does not even argue the point that the Agency had no legal basis for making this threat, but merely argues that since MCM caved in and signed the consent agreement, it therefore conceded that there were grounds for the threat. The fact that MCM signed the consent agreement, does not belie the fact that the Agency in fact had no legal grounds or that Petitioner

Haley saw that the Agency was threatening to do something which it did not have legal grounds to do. The fact that the illegal threat was successful does not effect Petitioner Haley's right and duty to report the illegal conduct. This legal violation alone is sufficient to prove the reasonability of his belief that the law was in process of being violated under the standards suggested above.

III. THE PETITIONER HAD A REASONABLE BELIEF THAT THE AGENCY WAS IN THE PROCESS OF VIOLATING THE COMMUNITY REINVESTMENT ACT.

Respondent argues that Petitioner Haley could not have reasonably believed that there was a violation of the Community Reinvestment Act, because the purposed merger never took place. Brief in Opposition, 7 and 11.

The record showed that the Roosevelt Bank had in fact been solicited to merge and take over MCM. C.A. App. 168, 182, 305, 308, 309; Tape 2 at 2-7; Tape 5 at 14-

18. The Examiner-in-Charge believed that is was a "done deal," C.A. Tr. Tape 2 at 2; Tape 5 at 13-14, 16-17. Roosevelt Bank had a miserable record of compliance with the Community Reinvestment Act, C.A. App. 168, 325-340; Tape 2 at 27; Tape 4 at 23-24; Tape 5 at 14-18, 24-32. Despite said record the Agency had recently granted Roosevelt permission to merge with a failing institution in a nearby town. C.A. Tr. Tape 2 at 4.

Petitioner was not required to wait until MCM was merged out of existence, before he blew the whistle. There is no question that his belief that violation of the CRA was occurring was reasonable.

To the extent that the Administrative Judge found that Petitioner Haley was merely speculating his finding is completely unsupported by the evidence. The evidence shows that the CRA violation was in the process of happening, and would have been completed but for Petitioner's blowing the whistle.

IV. PETITIONERS BELIEF THAT MCM WAS ENTITLED TO AN EXEMPTION FROM SANCTIONS WAS IMMINENTLY REASONABLE.

The Respondent argues that page 11 of its Memorandum in Opposition that in order to have an exemption from the need to have a plan acceptable to the director, an institution must have a plan acceptable to the director. As pointed out at page 13 of the Petition for Certiorari, this interpretation is at odds with the Treasury's own regulations and the OTC's own interpretation. 12 C.F.R. Sec. 567.10(c), cited by Respondent, Brief in Opposition, 11, is not applicable. It refers only to requests for exemption made pursuant to Sec. 567.10(b)(2). Sec. 567.10(b) applies only to requests made after January 1, 1991. Petitioner was terminated on July 26, 1990, before this subsection became effective.

12 C.F.R. Sec. 567.10(a)(3) provides that prior to January 1, 1991, in order to be acceptable to the director,

the plans must meet the requirements of Sec. 567.10(a)(2)(i)-(v). It omits 567.10(a)(2)(vi), which provides "it is acceptable to the director," thus avoiding the circular argument of Respondent, under which no exemption could ever be granted, because the institution would have to have obtained approval for the plan, in which case no exemption would be needed.

T.B. 36-a, C.A. App. 105-111, was issued on March 8, 1990. In its provisions relating to granting capital exemptions, there is no requirement for an approved capital plan. C.A. App. 106. Petitioner Haley reasonably believed at the time of his disclosure, that Agency approval of the plan was not a requirement for exemption from sanctions otherwise applicable to an institution which did not have an approved plan.

V. PETITIONER WAS NOT BLOWING THE WHISTLE ON THE REJECTION OF MCM'S CAPITAL PLAN.

Respondent repeatedly misleads the Court as to the issue in this case by inferring that the primary question in this case is whether the Agency's rejection of MCM's initial capital plan was unreasonable.

The Respondent makes the contention that the Petitioner did not have a reasonable belief that the rejection of the plan was a violation of law or regulation. Brief in Opposition, 6 and 12.

Petitioner in his original Memorandum did not claim that the original rejection of the plan was invalid or a violation of law. By misstating the issue the Respondents, the Administrative Judge and the Court below, attempted to avoid the violations of law, rule and regulations which Petitioner did set forth. Petitioner believed that the plan could be successful with certain additional conditions. He stated this in his Memoranda.

Petitioner was in fact correct in this belief. The Agency subsequently allowed the plan to go ahead with some of the conditions suggested by Petitioner. Respondent concedes that after these said modifications, really conditions, were met, the plan was approved and was successful. Brief on Opposition, 12. Somehow the Board, the Court Below and the Respondents have managed to lose sight of the fact that it was only because of Petitioner Haley's intervention, that the merger did not take place and that MCM was allowed to go ahead with its plan.

VI. RESPONDENT INCORRECTLY CHARACTERIZED PETITIONER'S ARGUMENT WITH RESPECT TO MCM'S NET WORTH CERTIFICATES.

Petitioner does not on page 13 of the Petition state that the Net Worth Certificates were required to be core capital. See Brief in Opposition, 10.

Rather the Petitioner argued that the savings

provision of FIRREA, required that these NWC's continue to be recognized as statutory capital. Moreover, he argues that failure to honor the contractual obligation involved in the issuance of the Net Worth Certificates by MCM to the government agency (FDIC) was a constitutional violation. This position has been upheld in the authority cited by Petitioner at page 14 of its Petition. If the Claims Court has accepted this argument, it is hard to see how Petitioner was unreasonable in accepting them.

While the argument can be made (and Petitioner conceded), that the Net Worth Certificates should be excluded from "core" capital, they certainly could not be excluded from regulatory capital altogether. See Petition for Certiorari, 12.

Finally, Petitioner suggested that these Net Worth Certificates could be converted to core capital, as is conceded by Respondent. Brief in Opposition 10-11. The Agency already knew that such a conversion was

permissible at the time Petitioner was terminated. C.A. App. 166, 188.

VII. THE RESPONDENT INCORRECTLY SUGGESTS THAT PETITIONER HAS SOME DUTY TO CONDUCT A FURTHER INVESTIGATION BEFORE BLOWING THE WHISTLE.

Respondents quote the Administrative Judge's holding that Petitioners course of conduct plainly constituted a lack of effort and inquiry on his part into the facts governing a situation. Brief in Opposition, 7.

There is no law requiring Petitioner to proceed through agency channels before blowing the whistle. See Pickering v. Board of Education, 391 U.S. 563, 568-573 (1968); Southside Public Schools v. Hill, 827 F.2d 270, 272-3 (8th Cir. 1987); Anderson v. Central Point School Dist., 554 F. Supp. 600, 608 (D. Or. 1982). The law was drafted to encourage whistleblowing and not to require that the whistleblower have complete proof of every fact

and detail before daring to come forth and make a charge.

In fact, the record in this case shows a long continuing course of conduct by Petitioner in the effort to save MCM from destruction by the Agency. C.A. App. 134-235, 54, 59, 62; Tape 1 at 6, 7, 10, 11; Tape 2 at 42-3; Tape 3 at 127; Tape 4 at 4-9. Petitioner only blew the whistle when he became convinced that the merger with Roosevelt was a done deal as far as the Agency was concerned. C.A. Tape 2 at 2; Tape 5 at 13-14, 16-17.

CONCLUSION

For the reasons set forth above the Respondents arguments are not well taken, and the Court should review this case in order to clarify the standard for a review where the contention is made that the alleged whistleblower does not have a reasonable belief that there has been a violation of law, rule, regulation, gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety, and order the correct application of said standard to this case.

Respectfully submitted,

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